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Supreme Court, U.S.
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No. 02-1466

IN THE

Supreme Court of the United States

BERTRAND R. FAVREAU, II, *ET AL.*,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners submit this supplemental brief to alert this Court to the Ninth Circuit's decision in *Hensala v. Department of the Air Force*, __ F.3d __, 2003 WL 22128924 (9th Cir. Sept. 12, 2003).[1] *Hensala* is relevant to this case in two important respects. *First*, it reveals that the Defense Department continues to take wildly inconsistent positions on the meaning of "voluntary" separation for recoupment purposes. *Second*, the Ninth Circuit's opinion rests on a construction of the statutory language that directly conflicts with that of the Federal Circuit and the Court of Federal Claims in this case.

The issue in *Hensala* was the propriety of recoupment from an Air Force doctor discharged for violating the "Don't Ask, Don't Tell" policy by revealing his homosexuality. The district court upheld the recoupment, but only because it concluded that the Air Force had properly determined that the doctor *intended* to bring about his own discharge, and, thus, his separation was "voluntary." *Hensala v. Department of the Air Force*, 148 F. Supp. 2d 988 (N.D. Cal. 2001). Petitioners cited the district court decision in their Petition for Certiorari (at 14-15), and pointed out that the interpretation of voluntariness applied there was flatly at odds with that of the lower courts in this case and would require a different result if applied to petitioners' weight and fitness discharges. In its Brief in Opposition, the government did not contest that the district court's reading of the statutory language was in conflict with that of the courts in this case.[2] Instead, it argued that a district

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[1] The Ninth Circuit's slip opinion is also available on the court's website, at www.ca9.uscourts.gov/ca9/newopinions.nsf/C8A550ADC8E01D0C88256D9E007B7B0B/$file/0116791.pdf?openelement.

[2] *Hensala* involved 10 U.S.C. § 2005(a), which governs recoupment of educational payments and uses precisely the same operative language ("voluntarily or because of misconduct") as the statutes at issue in this case. The government's Brief in Opposition contained no suggestion that this identical language addressing the same subject should be interpreted differently under § 2005(a) than under the statutes at issue here.

court opinion with "no precedential effect ... establish[ed] no conflict warranting review by this Court." Govt. Br. 14 n.9. The government did not inform the Court that the case was then on appeal, nor did it disclose to the Court the very different position it took on "voluntariness" in that appeal.

The Ninth Circuit has now affirmed the district court's decision in part and reversed it in part. On the issue of "voluntary" separation, the Ninth Circuit's opinion makes clear that the Defense Department in *Hensala* applied a construction of voluntariness that cannot be squared with the position the government has taken in this case. The Ninth Circuit explained that the Defense Department's position with respect to the "voluntariness" of a "Don't Ask, Don't Tell" separation is that, although such a separation obviously rests on a volitional act by the service member (namely, a voluntary statement that he or she is homosexual), the separation itself is voluntary only if the service member intended to bring the separation about by making the statement. This interpretation, the court stated, was set forth in a memorandum by Deputy Defense Secretary Deutch in 1994, and has been applied by the Defense Department to "Don't Ask, Don't Tell" discharges since that time. Slip op. at 13593. As a result, according to the Ninth Circuit opinion, the Defense Department's recoupment policy permits service members "an opportunity to present evidence as to the question of intent to separate" (slip op. at 13599), and no recoupment is permitted if such intent is not present. Indeed, the court reported that of 28 Air Force discharges under the "Don't Ask, Don't Tell" policy, five involved no recoupment, as a result of the Air Force's "individualized determinations with respect to each service member's intent to separate." Slip op. at 13600.

The policy applied and advocated by the Defense Department in *Hensala* is wholly inconsistent with the interpretation of "voluntary" separation that the Department has advanced in this case. A member's voluntary revelation of his or her sexual orientation is much more obviously "volitional"

than a member's failure, despite good faith effort, to lose weight or achieve physical fitness objectives. Nonetheless, the government contends that a failure to meet weight or fitness standards despite good-faith effort makes the resulting discharge voluntary despite the service member's desire to serve, while a "Don't Ask, Don't Tell" discharge is considered voluntary only if accompanied by a purpose to seek discharge. The government's position in *Hensala* thus makes a mockery of its assertions in this case that it has consistently applied a rational construction of the statutory language that supports recoupment from petitioners.

Even more importantly, the Ninth Circuit in *Hensala* expressly adopted and applied a construction of the statutory voluntariness standard that directly conflicts with the lower courts' interpretation of the same language in this case. The plaintiff in *Hensala* contended that the government had violated the statute by applying a "presumption" of voluntary separation and pursuing recoupment against him despite the absence of evidence that he actually intended to bring about his own separation from the service. The Ninth Circuit rejected these contentions, holding that recoupment was permissible under the statute because the evidence supported the Air Force's *individualized determination* that he had disclosed his homosexuality for the *purpose* of bringing about his separation from the service.

The Ninth Circuit's holding thus rested on a reading of the statutory language as permitting recoupment only when a service member's separation is voluntary in the sense that the service member's actual motivation is to leave the service, not merely whenever the separation is the result of some supposedly "volitional" conduct by the service member. That reading of the statutory language is the exact opposite of the one applied by the courts below.

As noted above, the government's only response to petitioners' citation of the *district court's* opinion in *Hensala* was that a conflicting district court opinion was not a basis

for a grant of certiorari. The Ninth Circuit's adoption of the district court's construction of the statutory voluntariness standard lays that argument to rest. The Ninth Circuit's reading of the statutory language in *Hensala* is entirely inconsistent with the lower courts' construction of the identical language in this case. This court should grant certiorari to settle the meaning of these important statutes.[3]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[3] In a part of its holding not directly relevant here, the Ninth Circuit went on to hold that the plaintiff should have a chance to pursue, on remand, an Equal Protection claim based on the allegation that the government's recoupment policies with respect to homosexuals discharged under the "Don't Ask, Don't Tell" policy were less favorable than those applied to *heterosexuals* discharged for committing homosexual *acts* in violation of 10 U.S.C. § 925. This issue is not pertinent here, though it is notable that the services actually treat a member discharged under the "Don't Ask, Don't Tell" policy more *favorably* than one discharged for weight and fitness reasons. In the former case, the member has a chance to prove that he did not intend to bring about his discharge, but in the latter case, the government seeks recoupment regardless of whether the member intended and attempted in good faith to remain in the service.